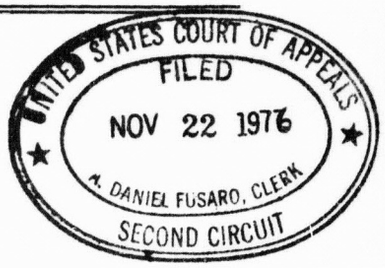
United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

No. 76-6150

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
October Term, 1976



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

v.

LOCAL 14, INTERNATIONAL UNION OF OPERATING ENGINEERS; LOCAL 15, INTERNATIONAL UNION OF OPERATING ENGINEERS; ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE INTERNATIONAL UNION OF OPERATING ENGINEERS AS AMICUS CURIAE

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This brief amicus curiae is filed by the International Union of Operating Engineers with the stipulated consent of the parties, pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

I. INTRODUCTION

1. The Scope of this Brief

The International Union of Operating Engineers (hereafter the "International Union" or "IUOE") is composed of two-hundred fifty-three (253) affiliated local unions in the United States and Canada, representing 420,000 members. Two of its affiliated local unions, Locals 14 and 15

(hereafter "Locals"), were defendants in the present case and are appellants in this Court; the Locals were found to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., in their admissions policies and in the operation of a referral system for jobs within their jurisdictions. The contractors with whom the Locals engage in collective bargaining and who employ members of the Locals were not alleged to have engaged in discriminatory conduct, although they were joined as defendants for purposes of relief. (See Rule 19(a), Fed. R. Civ. Pro.).

After the decision holding the Locals liable under Title VII, 415 F.Supp. 1155, the District Court issued an expansive order which, among other things, reorders substantially the collective bargaining agreements entered into by the Locals, requires the appointment of an outside paid Administrator with broad powers over internal union affairs, and orders the Locals to pay to a loosely-defined group of minority workers 100% of the back pay due that group for lost job opportunities, without regard to whether it was the union rather than a contractor or contractors who was responsible for their failure to obtain employment.

Since the criteria for the admission of members, the contents of collective bargaining agreements and the creation and running of hiring halls are all matters left to affiliated Local Unions, [1/] and since the finding

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1/ See Appendix A to this brief.

of liability was based upon a lengthy trial in which it did not participate, the International Union is not in a position to deal with questions relating to whether the Locals have in fact violated Title VII.[2/] But the Order issued, when evaluated in light of the grounds upon which liability was found, clearly goes far beyond its proper office -- redress of any violations which may have occurred -- and must be substantially modified.

This brief amicus curiae, therefore, is limited to certain questions raised by the remedial order and, in particular, to aspects of that order which impinge upon the rights and responsibilities of the IUOE's affiliated local unions generally. In discussing these questions, the IUOE may be able to present additional perspectives upon employment relations in the trade it represents helpful to the Court in evaluating the relief granted.

2/ We underline the point that the IUOE is not indifferent to compliance with Title VII. The International Union has had a continuing policy requiring the admission and treatment of minority persons engaged in employment, or interested in becoming employed, in the trade jurisdiction of a Local Union on the same terms as are applicable to white members. Article XXIII of the IUOE Constitution provides that admissions standards "shall not be discriminatory in any manner," and Article XXIX prohibits any discrimination on the basis of race, creed, color, sex, or national origin by one member against another. (See Appendix A to this brief.)

The IUOE has, in addition, sponsored programs designed to increase the number of minority persons engaged in work within its trade jurisdiction. For example, as the district court mentioned, "[t]he IUOE has since 1965 sponsored a Job Corps training program for operating engineers . . . financed by the Federal Government." (415 F. Supp. at 1164.) This program produces "large numbers and percentages of minority graduates." Id. at 1165. Further the President of the IUOE, J. C. Turner, is currently Chairman of the Labor Affairs Division of the National Urban League's Trade Union Advisory Committee, which is dedicated to increasing job opportunities for minority workers.

2. General Principles of Relief Under Title VII

Once a violation of Title VII has been found, "the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2nd Cir.). See 42 U.S.C. §2000(e)-5(g). However, while:

> "owing to the structure of the federal judiciary * * * choices [as to appropriate relief are] left in the first instance to district court's * * * such choices are not left to a court's inclination but to its judgment; and its judgment is to be guided by sound legal principles. United States v. Burr, 25 F. Cas 30, 35 (CC Va 1807) (Marshall, C.J.) * * * That the court's discretion is equitable in nature * * * hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review. [W]hen Congress invokes the chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes * * * ."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 416-417. See also Franks v. Bowman Transportation Co., ____ U.S. ____, ____, 44 U.S.L.W. 4356, 4663. Therefore, the remedial order of a district court in a Title VII case "must * * * be measured against the purposes which inform Title VII." (Albemarle, supra, 422 U.S., at 417.)

In Albemarle, supra, the Supreme Court defined at least two "purposes" of Title VII against which relief is to be measured. The first is to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v.

Duke Power Co., 401 U.S. at 429-430; Albemarle, supra, 422 U.S. at 417. This touchstone for relief has at least two implications for the present case. First, the affirmative relief granted should generally be related to the "barriers that have operated in the past" -- that is, to the violations found. The finding of a Title VII violation does not provide the district court with a general authority to restructure in a way the Court prefers aspects of the employment relationship not linked to the bases for liability.

Second, since, as the Supreme Court stated, relief directed at this effectuating purpose of Title VII is designed in part to "'provide[ ] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices'" (Albemarle, supra, 422 U.S. at 417-418), remedies directed toward this end must have been within the power of the party found liable to have effectuated by its own actions in the first place.

The second purpose of Title VII which the relief granted may further is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle, supra, 422 U.S. at 418; see Franks, supra, ____ U.S. at ____, 44 U.S.L.W. at 4361. Again, this principle has pertinent corollaries.

First, the relief granted in furtherance of this purpose should run in favor of those who actually were discriminated against, and not

those who were not. Patterson v. American Tobacco Co., 535 F.2d 257, 265 (5th Cir.); Acha v. Beame, 531 F.2d 648, 656 (2nd Cir.); Stevenson v. International Paper Co., 516 F.2d 103, 118 (5th Cir.). Second, plaintiffs who have been victims of discrimination are not entitled to relief which provides them benefits or protections they would not have received had they not been such victims -- that is, they are not entitled to relief which puts them in a better, or at least materially different, position than if there had been no Title VII violation. For, such a result does not make them "whole."

The Albemarle Court noted also that Title VII's "backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act" and that the "framers of Title VII stated that they were using [Section 10(c)], the NLRA [remedy] provision as a model." 422 U.S. at 419 and n. 11. It is, of course, well settled NLRA law that

> "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme * * *.
>
> "[The] language [of Section 10(c)] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board

> may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 235, 236. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267, 268. We adhere to that construction.
>
> "In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.
>
> "We think that affirmative action to 'effectuate the policies of this Act' is action to achieve the remedial objectives which the Act sets forth." (Republic Steel Corp. v. Labor Board, 311 U.S. 7, 10-12; see also, e.g. Carpenters Local 60 v. Labor Board, 365 U.S. 651, 655-656).

Thus, the fair inference from Congress' express reliance on the NLRA, and from the Albemarle emphasis on the proposition that Title VII bestows equitable powers on the courts, is that a district court's order, like an NLRB order, is to be "remedial not punitive."

There is one further principle of Title VII relief which the Supreme Court has not yet addressed specifically, but which this court has recognized: where the relief granted would collide with other legitimate governmental policies, it should be particularly carefully scrutinized as

to its necessity in furtherance of Title VII's purposes. For example, in Kirkland v. New York State Dept. of Correctional Services, 520 F. 2d 420 (2nd Cir.), one of the reasons given for disapproving a racial quota was that doing so would violate New York's civil service laws. The court noted that:

> "[c]ivil service laws, like civil rights laws, were enacted to ameliorate a social evil . . . . It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts; and if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people speaking through their legislators." (Id. at 429.)3/

Since the federal labor policy is based on the presupposition that industrial peace is best promoted by committing certain matters to the collective bargaining process between employers and unions (see especially H.K. Porter Co., Inc. v. NLRB, 397 U.S. 99), this policy, too, should not be disturbed except where alteration of the negotiated agreement is necessary to remove barriers to equal opportunity or to make victims of discriminatory practices whole.4/ Dobbins v. Local 212 IBEW, 292 F.Supp. 413 (S.D. Ohio).

3/ Similarly, in EEOC v. Local 638 . . . Local 28, Sheet Metal Workers, 532 F.2d 821 (2nd Cir.), the court noted the federal labor policy favoring union self-government in evaluating the propriety of appointing an administrator, and approved the appointment only because of "the union's past recalcitrance." (Id., at 829.)

4/ Those aspects of a collective bargaining agreement which are themselves in violation of Title VII may, of course, be invalidated or modified. The premise, for example, for the relief with respect to seniority carryover and rate retention in United States v. Bethlehem Steel Corp., 446 F.2d 652, 659-665 (2nd Cir.), was that the existing seniority and transfer provisions perpetuated discrimination and therefore violated the Act." (Id., at 659.)

II. THE ORDER OF THE DISTRICT COURT WITH RESPECT TO THE OPERATION OF THE HIRING HALL IS IN CONTRAVENTION OF NATIONAL LABOR POLICY, UNRELATED TO THE VIOLATIONS FOUND, AND UNWORKABLE GIVEN THE REALITIES OF THE CONSTRUCTION TRADE

1. The Referral System in Locals 14 and 15

The analysis above of the considerations pertinent to evaluation of the relief granted in a Title VII case requires that any such evaluation begin with an understanding of the precise bases for liability. For, unless it is understood what practices were held to result in racially disparate treatment, it is not possible to determine whether the relief granted removed the "barriers" to equal employment the defendants were found to have erected, or went beyond removing those barriers, nor can it be adjudged whether the remedy predominantly benefits those not harmed on the basis of race or national origin, or benefits those harmed but does so in ways unrelated to the injury suffered. While, as noted, questions of liability, and therefore analysis of the record, are generally beyond the scope of this brief, the findings with respect to the referral system are both incomplete and, in certain pertinent respects, clearly erroneous, so that some discussion of the facts is necessary here.

First, the district court stated, with respect to the distribution of hiring responsibility between the unions and the employers:

> "Locals 14 and 15 are the exclusive bargaining agents for 95% of the persons operating and maintaining construction equipment and doing surveying work within their respective trade and geographic jurisdictions. The Locals have collective bargaining

> agreements with a large number of employers and employers' associations (PX 40-60) which require the employers to recognize the Union as a source of qualified employees (e.g., PX 50C, at 3; PX 46, at 3). Although there are instances where employers may initially hire nonunion help directly, both unions effectively control the work opportunities within their jurisdiction. Until the forties, Locals 14 and 15 had closed shop contracts with employers which required these employers to hire only union members. (Tr. 59)." 5/ (415 F. Supp. at 1162-1163.)

This finding is clearly erroneous in one respect and questionable or misleading in another. Many of the collective bargaining agreements in the record do not recognize the union as a referral source. For example, none of the agreements with the Members of the General Contractors Association of New York City since 1960 have had any such provision; rather, they uniformly state as two of the governing principles of the Agreement, in slightly variating language:

5/ The fact that the Locals had closed shop agreements until 1948 was heavily relied upon by the district court. (415 F. Supp. at 1174.) The pertinence of this fact entirely escapes us. Such agreements were perfectly legal at the time they were in force (see pp. , infra); and private discrimination based upon race and national origin was not declared illegal until 1964. While it has been held to be illegal to continue a seniority system in effect in certain circumstances where there was hiring and assignment discrimination prior to 1965 (e.g., United States v. Bethlehem Steel, supra), the closed shop has not existed for nearly thirty years, so it cannot be deemed a presently illegal practice. Further, while we are not aware of any record evidence on this matter, the proportion of present white union members actively working who could have benefitted from the closed shop agreements is relatively small, for any member under approximately fifty years of age could not ever have worked under such an agreement, and many of those over fifty presumably joined the union after 1948 as well.

> "5. That workmen are at liberty to work for whomsoever they see fit, but that they are entitled to and shall receive the wage agreed upon as hereinafter set forth in this Agreement.
>
> "6. That the Employers are at liberty to employ and discharge whomsoever they see fit, and that the Party of the First Part shall at all times be the sole judge as to the work to be performed and whether such work performed by any members of the aforesaid Party of the Second Part employed by it is or is not satisfactory."(I Jt. App. pp. 134-135; 150-151; 167, 168; 183, 184; 289, 290; 300, 301-302; 312, 313; 325, 326; 348, 349; 382, 383; 396-397, 398; 414-415, 416.) 6/

Further, none of the recent agreements in the record gives the unions either exclusive referral power, or any guarantee that contractors will rely upon the unions for referral in the first instance, or, indeed, any promise that contractors will inform the unions of job openings. Thus, employers remain free under the agreements to hire workers, both union and non-union, directly; and there is ample evidence in the record that this authority was routinely exercised. (Tr. 653, 680.) Concomitantly, workers, both union and non-union, are free to "hunt" jobs from contractors without any union help or hindrance, and do so frequently. (Tr. 3062, 3381, 3283, 3215, 3304.)

Indeed, were this not so, another of the district court's findings would be difficult to understand. For the court found:

> "Local 15 runs a hiring hall, known as 'the hall' or the 'day room'. Employers and employees rely heavily on the Union for job referrals, 30% of the members of

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6/ All references to the Joint Appendix are designated "Jt. App."; references to the transcript are designated "Tr."; and references to the original record are designated "Orig. Rec.".

> Local 15 using the 'day room' with the remaining 70% steadily employed." (415 F. Supp. at 1165.)

The district judge did not explain what is meant by "steadily employed." However, given the character of the industry (see Tr. 70-78; see also pp. 32-37, infra), he could not have meant that they had permanent jobs; rather, at least a significant proportion of the 70% must have been "steadily employed" in the sense that they regularly found jobs on their own and did not have to resort to the referral system. (See Tr. 93.)

This conclusion is bolstered by the fact that much of the appellee's contention that the referral system was discriminatory was based upon the fact that:

> "[e]mployers [sometimes] either call directly a former union employee or use a word of mouth or nepotistic process which inevitably provides them with union friends or relatives. Accordingly, as long as the union is overwhelmingly white, whites get job preference from these informal practices. [A]ny employer who hires union men directly without using the union itself automatically favors whites. * * * When the employer asks other union employees to refer people they know, again whites get favored." (Plaintiff's Proposed Findings of Facts, Orig. Rec. Item No. 90, at p. 43.)

Thus, the Plaintiff's presentation recognized and relied upon the fact that employers can and do hire both union and non-union members directly. 7/

7/ The collective bargaining agreements of the Locals do not, as they may not under federal law, require that workmen be members of the union when hired (see §§8(a)(3), 8(b)(2), and §8(f) of the National Labor Relations Act, 42 U.S.C. §§158(a)(3), 158(b)(2), and 158(f)). They do require that non-union workmen become members of the union within seven, or thirty, days. Under federal law, such provisions are enforceable unless, inter alia,

Second, the court went on to describe the operation of the union referral systems:

> "Work assignments are not customarily made on a first come, first served basis * * * . In making the work assignment, the decision of the business agent is based upon subjective rather than objective criteria. * * * There is no credible evidence of deliberate discrimination in the referral procedures over recent years [. However,] there is not sufficient information made available to nonunion applicants, particularly minorities. * * * This system of giving work to union and nonunion men on the basis of the subjective, discretionary decisions of business agents, unsupported by objective and fair tests or criteria, or even by personal observation with respect to the job skills in question, and often the result of ignorance or personal preference, operates to the disadvantage of minorities. * * * [In addition] Local 14 admittedly gives preference in job referrals to union members, thereby effectively shutting non-union minorities out of work within its jurisdiction and precluding them from obtaining training and experience to get a city license. The job referral system itself is informal and unstructured, with minorities who are not union members getting jobs only when there is a shortage of available union men." 415 F. Supp. at 1165-1166, 1169, 1176 (emphasis supplied). 8/

Thus, the finding that the referral systems were unlawful was based neither on any intentional discrimination -- such was specifically held not to exist -- nor upon the existence of a formal system which tended to "lock

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"membership was not available to the employee on the same terms and conditions generally applicable to other members." NLRA §8(a)(3), 42 U.S.C. §158(a)(3). Therefore, when a workman has worked for an employer for the requisite time period, the union must ordinarily then admit him to the union or allow him to continue to work without joining the union.

8/ The court went on to note:

> "Local 14 concedes that its 'day room' is only available to assist members and licensed non-members. (Local 14 Memo., at 18). Permits are issued on occasion for non-licensed work, * * * ."(415 F. Supp. at 1176.)

Since only licensed non-members will be referred by the union, the fact that permits are issued for non-licensed work demonstrates again that non-union workers can obtain work directly from contractors.

in" minorities who had been discriminated against in the past to lower paying, shorter duration, or fewer jobs. Rather, any discriminatory effect was found to result from the very lack of a systematic means of referral, and consequent reliance upon the personal knowledge and acquaintances of the union's referral personnel.

Finally, and significantly, the court below found that "[t]here is no competent evidence that minority non-union men have been discriminated against on a job to which they have been referred by Local 15 or by their employers." (415 F. Supp. at 1167.) Thus, the court necessarily found that the union did not encourage layoffs of minorities once referred, or interfere with an employment relationship once established. And, there is no finding that the union as such had or sought any role whatever with regard to the call-back practices of employers -- that is, whether, after a lay-off of short or long duration the employers would recall their former employees or contact the union referral systems for new employees.[9/]

To summarize then, and relate the findings to the earlier principles: The court did find that the referral system constituted in some respects a barrier to equal employment opportunity, and, by implication, that certain

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9/ Under the collective bargaining agreements, there was never any need to define what constituted a "new" job, since employers were free to use or not use the union referral systems for any hiring. There was no evidence taken, to our knowledge, regarding the reasons for lay-offs, the average duration of lay-offs, or what the practice was with regard to calling back laid-off employees.

individuals may have suffered as a result. Given the large degree of employer control over hiring, however, the union referral system could not have constituted the only such barrier in the industry; to the extent minorities were under-represented or were individually injured, employer practices must have been independently responsible. Moreover, there is no finding that the union could have limited employers' call-back prerogatives had they wished to, or could have imposed an exclusive referral system on the industry, or that the failure to do either of these things was either intended to or did have the effect of limiting employment opportunities for minority workmen. Thus, the only "barriers" found to exist with regard to the referral systems were their subjectivity, and consequent disproportionate impact on minorities and, with regard to Local 14, the preference for union members.

2. The District Court Order as It Relates to Referral

The district court order included ten pages devoted to specifying the manner in which the unions are to operate their Hiring Halls henceforward. Among other provisions, the order requires:

> 1. That the unions shall operate a single hiring hall, with one integrated referral system. 10/

10/ We do not address at length in this brief the question whether the effective merger of work jurisdictions involved in this provision is within the authority of the district court to command. As the district court correctly found, "Locals 14 and 15 * * * are the only operating engineer locals in the country with the same geographic jurisdiction." 415 F. Supp. at 1160. The precise question is therefore beyond the scope of this brief, which is limited, as noted, to issues of general importance for operating engineers locals.

We do, however, wish to make two related observations regarding this aspect of the order. The first is that it appears to have been based on a factual error. The court found that "Local 14 maintains a joint hiring or job referral hall with Local 15 and has historically maintained this arrangement since much of the equipment is jointly manned." 415 F. Supp. at 1169. It is true that the hiring halls were "joint" in that they were located in the same building. However, the two unions' referral systems have always been entirely separate in their operation, with Local 15 merely renting space from Local 14. (Tr. 92, 93.) And, the district court decisively rejected the proposition that the two locals are in effect one, with Local 14 the journeyman arm and Local 15 the apprentice arm. 415 F. Supp. at 1161. Rather, while finding that "[a]s a general proposition the two Locals do 'the same work'" in the sense that the operations performed are similar (415 F. Supp. at 1160), the district court noted that there is a definite difference under the respective IUOE charters for the two locals regarding the particular machines and locations over which each has jurisdiction. (415 F. Supp. at 1161.) Thus, it is certain that the order, insofar as it requires a joint referral system, will work a substantial change in the relations between the two locals, by enabling members of each automatically to work on machines and in locations within the jurisdiction of the other. The district court may well have failed to recognize this effect, for it seems to have believed that the referral systems had always been integrated.

Second, the division of jurisdiction, craft and territorial, among affiliated local unions of an international union is generally an internal

2. That union members may obtain jobs only through that hall. 11/ (¶30, p. 15).
3. That a Master Eligibility List shall be kept, with provision for designating qualifications, and with power given to a court-appointed Administrator to supervise, directly or indirectly, the approval of qualification requests.

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matter for the decision of the international union. (Brewery Bottlers and Drivers Union v. International Brotherhood of Teamsters, 202 F. Supp. 464 (E. D. N. Y.); Parks v. Electrical Workers, IBEW, 314 F. 2d 886, 902, 906 (4th Cir.). The IUOE Constitution explicitly reserves this power. (Article XIV, Section 9.) While in Title VII cases courts have ordered the merger of local unions whose jurisdictional distinction was explicitly based upon racial considerations (see U.S. v. Jacksonville Terminal Co., 451 F. 2d 418 (5th Cir.); U.S. v. Longshoremen, 460 F. 2d 497 (4th Cir.)), here the peculiar jurisdictional grants were grounded in a historical situation (415 F. Supp. at 1161) entirely unrelated to any racial considerations. This being the case, some substantial nexus between the violations of Title VII which were found and the substantial eradication of jurisdictional divisions mandated by an international union would be necessary to justify the intrusion upon intraunion matters worked by this aspect of the relief; otherwise, courts would be free, for convenience of administration of their decrees, to disregard as well geographical jurisdictional lines among affiliated local unions. There is no such nexus apparent here; rather, as noted above, the remedy may be premised on a factual misconception. Therefore, this aspect of the relief ought at least to be remanded for the district court to reconsider in light of the true facts, and to explain, in a manner conducive to appellate review, the reason why effective relief demands such intrusion into matters ordinarily the prerogative of international unions.

11/ There is no explicit provision that non-union members are required to seek jobs through the hiring hall, or that contractors may only hire through the hiring hall. And, although "[a]ny Union member otherwise obtaining work shall forfeit his right to work within the Unions' jurisdiction for three months," there is neither any parallel penalty for non-union members nor any sanction against contractors who hire non-union members directly. Later provisions, however, require that "[a]ll workmen, regardless of place of residence, who seek referral to employment in New York City * * * personally appear at the Hiring Hall and register on the "Hiring Hall Sheet," (¶33, emphasis supplied; see also ¶34); mandate that "no employee shall be hired without [a work referral] slip;" (¶35(b)(6)); and provide that "if any workman is laid off by a Union Contractor for more than three days, he is required to register for referral at the Union Hiring Hall in order to obtain further employment." (¶34(a), emphasis supplied). Thus, the order is not entirely

4. That a chronological list shall be maintained of persons seeking referral, and that such persons must appear personally at the Hall each day or be stricken from the list.
5. That referrals shall generally be made in the order that requests are received, 12/ using the chronological list, and that contractors may generally not request workers by name.
6. That when referred, workmen shall be given a work slip, and no employee may be hired without such a slip.
7. That if a workman is laid off by a contractor for more than three days, he must register for referral and may not return to his job directly.
8. That the Administrator may appoint, until at least December 31, 1977, a monitor to oversee the Hiring Hall, and may alter the rules provided in the Order, with recourse to the district court.

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clear as to whether non-union men may continue, as all persons seeking work within the jurisdiction of the Locals could in the past (see p. , infra), to seek their own jobs directly from the contractors, or whether union and non-union workers alike can be hired only through the hiring hall. See p. 24, infra.

12/ One exception is that for oiler jobs, minority workmen desiring to learn crane operations are to be referred to every other job. We do not address the validity of this provision, on the understanding that the Locals will be discussing at length the propriety of quota remedies generally in this case.

3. Hiring Halls in the Construction Industry

The system thus established, with a few notable substantive exceptions,[13/] and with the exception of the provisions for outside monitors and an outside Administrator with broad powers, is a perfectly rational system which a union could establish pursuant to a collective bargaining agreement for exclusive referral authority. And many unions, both within and without the building trades, have determined that their members' interests are best served by such a formal and exclusive referral system, and have proceeded to negotiate successfully for an agreement with employers empowering union control over the hiring of workers; and to set up an elaborate scheme governing referral to jobs.

But it is equally true that even in the trades in which some union role in job referrals is not unusual, many unions, like Locals 14 and 15 (see pp. 9-15, supra) have a less predominant role in the hiring process. For example, one study estimated that exclusive work referral agreements cover about 50 percent of the workers (132 of 291 agreements sampled) in the organized sector of the building and construction trades industry, with another segment covered by nonexclusive work referral agreements, and another smaller but still significant portion of the industry (61 of 291 agreements studied) providing no contractual referral role for unions at all.

13/ In particular, the three-day limitation on job call-backs, as discussed pp. 32-39, infra, is entirely unworkable given the character of the industry involved. And the preference for certain minority workmen would presumably not be permissible in a voluntary agreement, unless, perhaps, it could be shown to be designed to remedy past discrimination against particular persons.

U.S. Department of Labor, Exclusive Work Referral Systems in the Building Trades (1970), at 23-24. (For purposes of the study, a referral system was considered exclusive both if the employer is required to recruit his labor solely through the union, and if the union has the first opportunity, usually with a time limit, to refer workers. Id. at 6, 22-23). Of the Operating Engineers agreements studied, twenty-four had exclusive work referral arrangements as defined and twelve did not. (Id. at 25.) Further, of eighty-two agreements providing for exclusive referral studied in detail, fifty-one specified a formal system for selecting applicants to be referred, and thirty-one did not. (Id. at 55-64.) While some such systems provided for a strict first-in, first-out system such as that ordered by the district court here, in others length of prior employment, residency in the jurisdiction, and other criteria were factors in setting priority of referral. (Id. at 56-59.) 14/

Another U.S. Department of Labor study observed:

> "With some exceptions, usually in the pipe and electrical trades, the unions we studied that have referral systems (not all do) use informal hiring procedures. Most union construction workers find work through individual job search, not through the unions. A union journeyman who has worked in an area for a year or two has come to

14/ See also U.S. Department of Labor, Characteristics of Construction Agreements, 1972-73, at 18-20, showing that 412 of 769 agreements studied had exclusive union referral, and 297 did not.

know other journeymen, foremen, superintendents, and contractors. If he is laid off, he learns about other job opportunities by word of mouth. In fact, if he is a good mechanic, he may be specifically requested by a supervisor or contractor. Of course, he may indicate to the business agent that he needs a new job, and when a contractor asks for men he may be referred out by the agent. By and large, however, competent mechanics make little use of the hiring hall except during times of low employment, when the business agent's contacts are valuable to even the best workers." U.S. Department of Labor, Training and Entry Into Union Construction (1975), at 41.

4. The NLRA Law Governing Hiring Halls

This variation in the role of building trades locals in the hiring process is the expression of the national labor policy in this area. For "the hiring hall, under the law as it stands, is a matter of negotiation between the parties to a collective bargaining agreement." Local 357, Teamsters v. NLRB, 365 U.S. 667, 676. The evolution of this doctrine under the National Labor Relations Act, and its implications, have significance in evaluating the relief granted here as to the hiring hall.

Under the National Labor Relations Act as originally passed in 1935, it was an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization," except that the "closed shop" was legal -- that is, employers and labor unions could agree to require membership in a union as a prerequisite to hire. National Labor Relations Act §8(3), 49 Stat. 452. This provision was altered in the Taft-Hartley Act of 1947, to outlaw the closed shop, but to permit employers and unions to require those hired to join the union after they were hired. National Labor Relations Act §§8(a)(3), 8(b)(2), 29 U.S.C. §§158(a)(3), 158(b)(2). See S. Rep. No. 105, 80th Cong., 1st Sess. (1947), at 5. However, while exclusive hiring halls in closed shop unions was one of the abuses Taft-Hartley was designed to eliminate (see id., at 6-7), the 1947 amendments did not address directly the legality of

union referral systems in other contexts. Confusion was thereby engendered regarding whether unions were permitted to continue to operate a referral system, exclusive or otherwise.[15/] See, e.g., Hearings on S. 1973, to Amend the National Labor Relations Act, as Amended, With Reference to the Building and Construction Industry, 82nd Cong., 1st Sess., at 158, 170, 173-174.

In 1958, the NLRB temporarily settled the question, in Mountain Pacific Chapter, 119 NLRB 883 (1958), ruling that union-operated referral systems are legal only if non-discriminatory with respect to union membership or non-membership, the employer retains the right to reject any job applicant referred, and all provisions relating to the functioning of the hiring arrangement are posted in appropriate places. (Id. at 897.) In Local 357, supra, however, the Supreme Court decisively rejected this approach:

> "It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to

15/ It is important to note for purposes of the present case that the controversy regarding the legality of an exclusive union role in hiring referrals was premised on the assumption that the employer ordinarily has the "normal * * * hiring prerogative", subject only to legal limitations such as those embodied in §8(a)(3) of the NLRA and in Title VII itself, and to any lawful collective bargaining agreement to which an employer may agree. Mountain Pacific Chapter, supra, at 894; see also S. Rep. No. 573 on S. 1958, 74th Cong. 1st Sess. (1935), at 11; Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 182-183.

the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. NLRB v Drivers, Chauffeurs, Helpers, etc., 362 US 274, 284-290. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

* * *

"Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included on excluded in collective agreements. Its power, so far as here relevant, is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it. (365 U. S. at 676-677) (emphasis supplied)

See also Local 138, International Union of Operating Engineers, 321 F.2d 130, 137-138 (2d Cir.).

Thus, employers and unions may enter into such agreements for union participation in referral as they see fit, as long as there is no discrimination based on union membership or non-membership in the operation of the system established.[16/]

16/ As noted, n. 11, supra, the Order of the district court imposes penalties upon union men not complying with the requirement that they seek jobs only through the hiring hall, but not upon either non-union members who do so or upon contractors who hire non-union members directly. It appears to us that this disparity may constitute a preference in the referral system for non-union members, and, if so, it would be unlawful under the basic NLRA principles governing this area, as enunciated in the text.

The IUOE has in essence incorporated this national policy as its own. That is, while an international union could, consistently with federal law, encourage its affiliated locals to negotiate exclusive referral authority as far as possible, in fact the IUOE has maintained a neutral position on the matter, leaving it to each affiliate to determine whether, in light of its resources and of the conditions within its jurisdiction, the interests of its members are furthered by an exclusive or nonexclusive referral system, or by none at all. The assertion by the district court of the authority to interfere with this prerogative where the NLRB may not, and the IUOE has determined in furtherance of its members' interests not to do so, is potentially detrimental to IUOE locals nationally.

5. Application of Title VII Relief Principles

From the foregoing, the conclusion is inescapable that the imposition of an exclusive referral system upon these locals, which have not negotiated such a system, and prefer not to have one, was improper relief given the liability found and the bases therefore.

First, the failure of the unions to have assumed in the past complete responsibility for hiring referrals was not found by the district court to have been one of the "barriers that have operated in the past to favor an identifiable group of white employees over other employees." (Griggs, supra, 401 U.S. at 429-430). While the government suggested (see p. 12, supra) that nepotism and friendship were factors in the operation of the direct hiring by employers, the court did not focus on this matter. Further, such a "barrier", even if it did exist, was not within the power of the union, as such, to correct; unless the employers were anxious to agree to an exclusive union referral system, which there is no indication that they were and which the current appeal in this case by two employer groups indicates they were not, the union had no means of forcing the employers to surrender their authority over hiring. Thus, insofar as there was a "barrier" erected in direct employer hiring, the responsibility is that of the employers who chose to rely on their employees for referrals, and not that of the union. And therefore, if the matter is to be corrected at all--and, without a remand and further findings we doubt there

is a basis for relief in this regard--the burden for doing must, in accord with equitable principles, be placed upon the wrongdoers, and not solely upon these unions.17/

Second, the imposition of an exclusive referral system appears entirely unsupported by any "make whole" purpose. For, those minorities who may have been injured in the past by the operation of the unions' referral systems will not necessarily benefit from the new system; they will be limited to one means of obtaining jobs rather than two, and some could therefore have fewer opportunities for employment than otherwise. On the other hand, the system could produce benefits for white employees or potential employees not the object of any racially-based illegal practices--those without the contacts or initiative to seek jobs on their own or, more probably, those without the competence to establish a demand for their services outside of the referral system. Further, to the extent that minority workmen do obtain more, or better, or longer jobs because no employees may seek jobs directly, they will be placed in a better position than if the union had not had referral practices discriminatory in effect; since the barriers found by the district court to exist with respect to employment could only have operated in favor of the 30% of the employees in the industry who frequent

17/ At least, this analysis requires that the cost of the salaries of the Administrator and any monitors or examiners with regard to the hiring hall be shared by the employers; and that the direct costs of running an exclusive hiring hall--rent, salaries for referral agents, computer time and so on--be shared as well.

the hiring hall, a remedy which may give preference to certain minority workmen over some of the 70% who have obtained their own jobs in the past, places them in a better position that if the unions had not engaged in behavior held illegal under Title VII. 18/

Finally, and quite clearly, the imposition of an exclusive referral system upon a union which has not negotiated such an agreement is in direct conflict with the federal labor policy in this area--that unions and employers may, or may not, choose to adopt such a system. Nor is this conflict merely one of principle. There are several cogent reasons why a local union may determine that it does not wish to assume such responsibility for hiring. Obviously, there is the expense of providing a location large enough to handle all those seeking work, union employees to handle referrals, telephone service, and so on. In addition, where the employers performing the work in an area are fairly constant, the need, as far as the members are concerned, for union control over referral is less, since the members will over time become familiar with the contractors operating in an area and know whom to contact for information on openings. Further, the members may feel that an exclusive referral system rewards

18/ There is some indication in the hearing on relief that the appellee regarded the exclusivity provisions as necessary to prevent the union transacting referrals outside of the official referral system. (See 1 Jt. App. p. 155, 230-231). But this subjective fear is not a sufficient basis for restructuring the employment relationship in this manner; bad faith response to a court Order may not be presumed without any reason, and there is no basis in the record upon which to base such a presumption. Further, sufficient protection would be afforded merely by providing that no officers or employees of the union shall inform any job seekers of job openings except through the referral system.

those who lack initiative or competence, and believe that the ultimate effectiveness of the union is enhanced by rewarding rather than hampering these qualities. Judgments such as these have been left by Congress, and by this International Union, to be determined according to local conditions and, unless there is a clear need to alter these judgments to afford an effective Title VII remedy that policy may not be infringed.

The past remedial treatment of referral systems by federal courts in Title VII cases is entirely consistent with our approach. For we are not aware of any case in which a court basically altered the responsibility for job seeking as between employers, employees, and unions. Rather, the courts have retained the basis existing system, changing it only to remove any barriers to equal employment created within the system.

For example, in the United States v. Local 638, Steamfitters, 360 F. Supp. 979 (S.D.N.Y. 1973), remanded on other grounds sub nom. Rios v. Local 638, Enterprise Ass'n Steamfitters, 501 F.2d 622 (1974), the district court was faced with a union which, while it "[did] not maintain a hiring hall, nor is there any formal referral mechanism" (id., at 990), did refer job seekers on occasion. The court held:

> "While there is no evidence that either Local 638 or MCA has engaged in purposeful discrimination against nonwhites the conditions of the industry set forth above, in combination with

> with the history of discrimination in admissions to the A Branch of Local 638, give whites advantages in obtaining employment. The result is the preservation of the effects of past discrimination. Accordingly, the referral practices of the steamfitting industry must be modified if past discriminatory patterns are to be corrected. See United States v. Local 638, Enterprises Association, etc., et al., 347 F. Supp. 169, 180-181 (S.D.N.Y. 1972) (Gurfein, J.), and cases cited therein." (Id.)

The court therefore ordered that:

> "Local 638 and MCA maintain up to date records of jobs available and of steamfitters seeking work. These records should be open to all interested parties, including employers, MCA, union business agents and officers, individual steamfitters, and 'minority referral services'." (Id., at 991)

Thus, the district court simply made rational and equitable the exercise of the limited responsibility the union had undertaken; and it required the employer (MCA) as well as the union to take responsibility for doing so.19/

The Government, in Dobbins v. Local 212, IBEW, supra, was seeking to "effectively erase the entire (exclusive) union referral system." 292 F. Supp. at 452. Judge Hogan declined to grant this relief because "the present referral system - with some obvious legitimate ends - should not

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19/ In United States v. Local 638, Steamfitters, 347 F. Supp. 169 the situation was quite similar to that here: the union did operate a semi-formal referral system, but not an exclusive one. The district court ordered a restructuring and rationalization of the existing system (id. at 184-185), but did not circumscribe the rights of employees to seek jobs on their own.

be eradicated unless such eradication is certainly required by Title VII." (Id. at 452). Rather, the court altered the internal operations of the referral system which did exist (id. at 453, 462-463) but did not remove the exclusive authority which the union had negotiated. See also EEOC v. Elevator Constructors, Local 5, 398 F. Supp. 1237 (E.D. Pa.), aff'd, 538 F. 2d 1012.

Based on these cases as well as our analysis, the district court had ample authority to remove the barriers perceived to operate against minorities, by ordering a rationalization and formalization of the previously subjective referral system. Consequently, presuming liability on the grounds the court below enunciated, we do not question, nor do the Locals, those aspects of the order which are directed toward this end (e.g., ¶¶ 33, insofar as it requires chronological sign-ups; 34(a); 34(b) (1)-(3) and (5) - (6); and 40). But those aspects of the Order with regard to referral which go beyond this purpose may not, consistently with the findings of the district court and the principles governing Title VII relief, be maintained.

6. The Call-Back Provisions of the Order

Even if the exclusive referral remedy is allowed to stand, one other aspect of the Order affecting hiring halls deserves invalidation for independent reasons. For, to this International Union and, we submit, to anyone familiar with construction industry, the call-back provision evidences an astonishing misunderstanding of the industry's operations. 20/ This provision (¶37(a)), reads:

> "Union Contractors are permitted to transfer workmen from job site to job site without the men registering in the Hiring Hall as long as there is no break in the continuity of the employment of such men. If any workman is laid off by a Union Contractor for more than three days, he is required to register for referral at the Union Hiring Hall in order to obtain further employment." 21/

That the construction industry is characterized by intermittent employment is widely recognized. This characteristic, for example, was the premise for the special building and construction trade amendments to the NLRA, added specifically to permit union and employers to enter into agreements providing for union participation, exclusive or non-exclusive, in job referral, and to provide for objective criteria governing

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20/ Of course, if the exclusivity provisions are eliminated, the call-back section must be removed as well, for restoring the authority of employees to take jobs without referral will necessarily include the authority to return to a job once held.

21/ The fact that the second sentence is included in a section headed "Transfers" in itself evidences an unfamiliarity with the building and construction industry. For, as discussed pp. 33-36, infra, there are several reasons for temporary lay-offs which do not involve any change in job sites.

priority in referral. (29 U.S.C. §§158(f).) The 1959 amendments were premised upon the fact that "[t]he occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise." S. Rep. No. 741, 86th Cong., 1st Sess. (1947), at 19.

Less generally understood are the precise reasons for this intermittence, and the fact that a layoff from work does not necessarily have the significance in the building trades which it may have in other industries. That is, since the frequent layoffs are caused primarily not by economic fluctuations but by endemic structural factors, a lay-off may be accompanied by the certainty or near-certainty of re-employment by the same employer. Thus, many of the lay-offs in truth represent no break in the employment relationship between the employer and his laid-off employees. The chief factors responsible for these kinds of layoffs are the inherent seasonality of outside construction; the vulnerability of outside construction to shutdowns caused by inclement weather other than seasonal in nature; the incremental phased nature of a construction project requiring specialized skills at each phase; and inherent frictional unemployment attributable to time lags between the conclusion of one project and the commencement of the next.

Workers in contract construction experience greater seasonal variations in employment than workers in any other non-agricultural

industry.[22] Because of the seasonal impediments of bad weather, both real and perceived, construction activity traditionally reaches its low ebb in the months of January, February, March and April, with the low point being February.[23] During those months activity at ongoing projects is curtailed and the commencement of new projects is delayed. During such seasonal downturns, it is economically unfeasible for contractors to retain a full complement of craftsmen in anticipation of the springtime resumption of work; the only alternative is layoff, with a promise, explicit or implicit, to rehire the same workers in the spring. But under the Order of the district court at ¶37, this kind of layoff will ordinarily preclude the contractor from rehiring his previous employees when work resumes in the spring, in spite of the fact that his previous employees may have acquired valuable knowledge as to the contractor's methods of operation, special skills in operating the specific pieces of equipment owned by the contractor, and the confidence of the contractor in their abilities. Thus, the stability and security available to both employer and employee by such "call-back" preference after a seasonal layoff would be lost with regard both to white and minority employees.[24]

22/ U.S. Department of Labor, Seasonality and Manpower in Construction, Bureau of Labor Statistics Bulletin No. 1624 (1974), p. 24.

23/ Id., Table 26, p. 33.

24/ While it may seem strange to characterize a promise of a job in four months as job security, it must be remembered that seasonality of this kind is likely to affect all or many of the construction projects in an area. Therefore, the alternative to the worker to a guaranteed job in four months is likely to be no job for four months and no guarantee of a job thereafter.

Inclement weather presents the same impediment to outside construction as does seasonality, but results in layoffs of a shorter and more unpredictable nature. Depending on the location and type of project, rain and snow can bring a total halt to construction activity, with a layoff of workers resulting. Under the Order of the Court, if the inclement conditions should continue for more than three days, the employees laidoff, white and minority, are denied the opportunity to return to their employer and their names are returned to the bottom of the referral lists.

When viewed in its component part, a construction project is a series of incremental projects which result in the finished product. At each stage varying numbers of workers skilled in each particular craft will be called for. In the construction of a building, the contractor will require a relatively large number of operating engineers to prepare the site and dig the excavation. As the project continues, a much smaller number of operators are called for, as the ironworkers, carpenters, cement masons and specialty tradesmen carry out the erection of the building. In this stage only a small number of cranes and hoists are in operation, and the workmen who operated the grading and excavating equipment in the earlier stages of the project will be laid-off. If that layoff should exceed three days, those operators will be effectively precluded from returning to that project in the latter stages, when an increased number of operators are generally needed

for disassembly and site clearance and finishing. Under the Order of the District Court, the employer is without the ability to complete his project with the crew of operating engineers with which he began, unless he chooses to carry them on his payroll for the duration of the project; any layoff in excess of three days will send these men, white and minority, to the bottom of the referral list.

Frictional unemployment, finally, is a generic term used, in the context of the construction industry, to refer to periods of unemployment attributable to the transitory flow of workmen from one construction project to another. When viewed in broad perspective, the construction industry is a dynamic institution, with employers and employees in a continuous flow moving from project to project as contracts and employment are secured by each. The court-imposed three-day limitation on call-back preference effectively precludes employers from re-employing their previous workmen, white and minority, on subsequent projects if there is more than a three-day time lag involved in the transition, even if the employer has already at the time of layoff been awarded a contract, but the work is not to begin for a few weeks. 25/

25/ An analysis contained in Seasonality and Manpower in Construction supra n. 22, summarizes, at p. 39, the nature and extent of unemployment created by the indigenous characteristics herein outlined:

> "The proportion of unemployment in construction of less than 5 weeks' duration and 5 to 14 weeks duration varies greatly

With an understanding of the above-described realities of the construction industry and the various patterns of intermittent employment resulting therefrom, the prior existing hiring system in Local Unions 14 and 15, which combined non-exclusive referral with the freedom of members to seek, and to return to after layoff, their own employment, takes on a logic apparently not perceived by the Court. And, even if the exclusive referral remedy can be justified, it must be fashioned to accommodate the structural characteristics and employment realities of the industry. Otherwise, legitimate expectations of continued employment relationships will be disturbed, in a manner analogous to the "bumping" remedy which this Court has disapproved (Chance v. Board of Examiners, 534 F.2d 993, 998-999 (2nd Cir.)), and they will be disturbed to no end related to the purposes of Title VII. For the district court found that there were no discriminatory practices once minorities were referred to jobs (see p. 14, supra); minority workmen therefore

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over the course of the year. The percent of unemployment of short-term duration (less than 5 weeks) is higher during the peak construction activity months of June through September, reflecting the high rate of frictional unemployment associated with construction. The high rate of short-term joblessness continues into November and December as construction activity declines. By January, the inability of any construction workers to find other jobs in the industry, because of the seasonal decline in activity, results in an increase in unemployment of 5 to 14 weeks' duration. Unemployment of 15 to 26 weeks duration, due to the accumulation of winter layoffs, reaches a high point in spring--generally constituting one-third of total reported unemployment by April. It remains high until construction activity picks up again in early summer. (See table 40 and appendix table G-21.)"

shared equally with their co-workers the benefits which potential certain or near-certain recall after structurally-necessitated layoffs represent to an employee in an otherwise uncertain job market. Disturbing present employment relationships and preventing the formation of such relationships in the future, as ¶37 does, therefore neither removes a barrier to equal employment opportunity or makes whole those injured in violation of Title VII.

If the exclusivity feature is to be retained, some means of defining when the employment relationship has in fact been severed and a new position created may, however, be necessary; collective bargaining agreements establishing exclusive union referral systems often do have such definitional provisions. But a three-day benchmark is, in our experience, unheard of.[26/] Rather, the provision ordinarily is and, as a matter of remedial relief, ought to be, related to the systemic causes of layoffs discussed.

It appears from the previous discussion that the longest type of layoff of generally-ascertainable duration which can be characterized as not breaking the employment relationship is that caused by seasonality. We suggest that the average length of such seasonal layoffs is the logical maximum length of time during which call-backs ought to be allowed.

26/ Based on familiarity with, and an unsystematic review of, collective bargaining agreements and exclusive referral systems existing in the construction industry, it appears that provisions allowing for employer call-back permit call-backs after layoffs of three to twenty-four months.

The statistics noted in n. 25, supra, suggest that the 15 to 26 week period, which constituted one-third of the total reported unemployment in the industry in April, is an appropriate starting point. The precise time period, if any, ought to be left to the district court to determine after taking evidence upon the average duration of seasonal unemployment for workers within the jurisdiction of the Local.

III. THE STANDARD ENUNCIATED IN THE ORDER WITH RESPECT TO BACK PAY ARE INCONSISTENT WITH THE PRINCIPLES GOVERNING TITLE VII RELIEF

The district court, in Section G of its Order, set standards governing the payment by the Locals of back pay to minorities for past discriminatory practices, leaving it to the Administrator to hold hearings and apply the standards to individual cases.[27/] Since the standards set are vague in some respects, and since no application of the standards has yet occurred, it is

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27/ We do not address at length in this brief whether appointing an Administrator with broad powers was proper. It appears, however, that this court, in recognition of the general labor policy favoring non-interference with the internal affairs of labor unions, has sanctioned such appointment only where the unions involved have demonstrated an unwillingness to comply with a Title VII court order without close supervision. EEOC v. Local 638 . . . Local 28, Sheet Metal Workers, 532 F. 2d 821, 829. There is no such indication with respect to Locals 14 and 15; indeed, there is not even any finding that either Local intentionally discriminated against blacks in the past. In these circumstances, we can percieve no justification for appointing any Administrator to supervise aspects of the Locals' operations. The district judge, in fact, seems himself to have been troubled by the Administrator provisions, including them in the Order primarily because the government was insistent and any alternative would have therefore delayed implementation of the Order as a whole. (I Jt. App. 180-181, 197, 198-199).

Further, the Administrator actually appointed is an attorney without experience in the building trades or with labor unions; he is to be paid $70 per hour, and has authority to hire assistants and consultants of various kinds and charge to the Locals the expense of doing so. The cost of the Administrator's services and those of his assistants and consultants, given the scope of the Administrator's authority, is likely to be quite huge. Given the principle that Title VII relief is to be "remedial not punitive" (see p. 7 , supra), we believe a much clearer showing of the necessity for this expense, and findings of the district court pertaining thereto, would be necessary to justify the Administrator provisions. In particular, the district court should be required to consider alternatives both to the appointment of any Administrator and, if convinced of that necessity, of the specific kind of Administrator appointed. No reason appears why most of the powers granted the Administrator need be excercised by an attorney; a person not an attorney but versed in the labor relationships in the construction industry could probably offer more efficient service at a much lower cost.

not possible at this time fully to adjudge whether the back pay provisions will result in fairly compensating those injured by the Locals' past practices. There are, however,certain aspects of the standards which are clearly contrary to the principles of Title VII relief discussed in Part I , supra, and to this court's recent decision in EEOC v. Steamfitters, Local 638, _____ F. 2d _____, 13 FEP Cases 705 (2d Cir. Sept. 7, 1976), and which must therefore be modified.

We do not quarrel with the provisions of ¶49, upon the standards for establishing basic eligibility for some back pay award.[28/] The provisions covering continuity of back pay beyond the month in which discrimination is established, and the method for computation of back pay (¶¶ 50-52), however, do not properly apply 42 U.S.C. §2000e-5(g), which provides that "[i]nterim earnings of amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce back pay otherwise allowable" (see EEOC v. Steamfitters, Local 638, supra, ____F. 2d at _____, 13 FEP Cases at 714-715) and may permit recovery against the Locals for discriminatory practices of employers alone.

As discussed earlier, workmen, white and minority, interested in working within the jurisdiction of the Locals have always been free to seek

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28/ We note, however, that problems may occur in application of this paragraph. Specifically, we would assume that since a putative discriminatee must demonstrate monetary damages from any discriminatory practices, denial of membership in a Local alone will be insufficient to establish eligibility; there will also have to be a showing that employment opportunities were thereby lost.

their own jobs directly from employers, and many - probably most - have done so. Therefore, a minority worker once denied referral or assistance by one of the Locals had the option of contracting contractors on his own and requesting employment.

If any individual minority workman did not independently seek work within the jurisdiction of the Locals, he did not, we would think, exercise "reasonable diligence" (42 U.S.C. §2000e-5(g) in seeking employment.[29/] Yet, under ¶51 and 52, it appears that no such obligation is to be considered in computing back pay. For, as long as a claimant can show for a given month that he is as "ready, willing and available to take work under the Union jurisdiction but worked or sought work elsewhere" (¶52, emphasis supplied), he may recover for that month , even if he did not seek work on his own within the Union's jurisdiction. Yet, in EEOC v. Steamfitters Local 638, supra, this court indicated, contrary to the Order here, that to recover back pay, a minority worker must show

> "that despite his efforts to find work with a contractor or with a steamfitting subcontractor he was turned down. He would also have to show that the union referred only white (employees)*** jobs the nonwhite stemfitter sought, which were filled by those referred." (_____ F. 2d at _____, 13 FEP cases at 711, emphasis supplied).

The Order must be revised to include a similar provision here.

29/ The only exception may be if the Local when contacted affirmatively misled him with regard to whether he could "hunt" his own job.

Second, if the minority workman did seek work on his own within the jurisdiction of the Locals, the reasons why he was not hired must be considered in computing back pay against the Locals. Here, unlike Steamfitters, Local 638, supra, liability of the employers has never been adjudicated, for none was alleged. We do not think that it may be presumed that employers did not discriminate in individual cases, or engage in practices which had discriminatory effect, such as relying on referrals from their present, primarily white employees. If either of these occurred with regard to a minority workman, the employer, not the Local, caused the failure to obtain work, and the Local should not be liable for back pay.

Third, if a minority workman applied for a job opening with an employer, was not hired, but is found not to have been the subject of employer discrimination, it may be presumed that he was not qualified for the job applied for. Once again, his failure to obtain work that month was not caused by any practices of the Local, and the Local should not be responsible for back pay.

Conclusion

For the reasons stated above and in the briefs of Locals 14 and 15, IUOE, the Order of the district court should be modified.

Respectfully submitted,

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Appendix A

(Excerpts from the Constitution
of International Union
of Operating Engineers)

1 Article XXIII, Subdivision 6

Procedure on Applications

"Any engineer engaged in the craft over which this organization exercises craft jurisdiction, or other person who may qualify to become a junior engineer, assistant engineer, or registered apprentice engineer therein, and any other engineer engaged as an inspector of boilers or other machinery or as an examiner engineers, or any other person, may upon application, acceptance and initiation in the manner and form required in this Constitution, become a member of the International Union of Operating Engineers. No person who is otherwise eligible under the qualifications fixed herein, but who is opposed to organized labor, shall be admitted to membership. No applicant for membership shall apply to or be accepted by any Local Union other than the one within the jurisdiction in which he is employed unless such Local Union shall consent to his affiliation therewith."(Article X, Section 1.)

"Applicants for membership shall be referred to a committee which may consist of the Local Executive Board in the Local Union, which committee shall investigate the character and qualifications of the applicants, and shall make a determination as to the qualifications of the applicant for membership in the Local Union. This determination shall be made on the basis of uniform standards, and shall not be discriminatory in any manner and shall be in accordance with all applicable law. The applicant, if approved, by the committee shall be so notified and his name and address shall be placed on the records and he shall be furnished a copy of the Constitution and his book of membership. If an applicant is rejected his initiation fee shall be returned to him. A rejected applicant may re-apply for membership after a lapse of ninety (90) days following his rejection."

2. Article XXIII - Subdivision 11, Section (e)

Contracts

"Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership. When such approval has been obtained, the agreement shall be signed by the Local Union's President, Recording-Corresponding Secretary, and Business Manager where the Local Union has such a position. Copies of final agreements and modifications thereof negotiated by Local Unions shall be filed with the General President immediately after execution."

3. Article XXIX

"No member of the International Union shall discriminate against any other member or applicant for membership on the basis of race, creed, color, sex, or national origin."

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6150

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Plaintiff-Appellee,

v.

LOCAL 14, INTERNATIONAL UNION OF OPERATING ENGINEERS; LOCAL 15, INTERNATIONAL UNION OF OPERATING ENGINEERS; ET AL.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Brief for the International Union of Operating Engineers as Amicus Curiae in the above-styled case were mailed to the following counsel on Friday, November 19, 1976:

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